

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: AMERICAN NEEDLE, INC., Petitioner, v. NATIONAL
FOOTBALL LEAGUE, ET AL.
CASE NO: No. 08-661
PLACE: Washington, D.C.
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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 08-661, American
5 Needle v. The National Football League.

6 Mr. Nager.

7 ORAL ARGUMENT OF GLEN D. NAGER

8 ON BEHALF OF THE PETITIONER

9 MR. NAGER: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 In this case, the Court of Appeals for the
12 Seventh Circuit held that an agreement of the 32 teams
13 of the National Football League was immune from any
14 scrutiny under section 1 of the Sherman Act on the
15 ground that the agreement allegedly fails the
16 plurality of actor requirement of this Court's
17 jurisprudence.

18 The 32 teams of the National Football League
19 are separately owned and controlled profit-making
20 enterprises. Under this Court's decision in NCAA, as
21 well as the Court's more general joint venture
22 jurisprudence, those clubs are entities whose distinct
23 agreements are, indeed, subject to section 1 scrutiny.

24 The fact of the matter is there is a long-
25 standing consensus, judicial and legislative, that

1 agreements among sports teams about whether and how
2 they will participate in the marketplace is subject to
3 scrutiny under the Sherman Act, section 1.

4 The Court's decision in NCAA is most
5 directly on point. In that case, the Court held that
6 a policy of the NCAA that restricted the ability of
7 member institutions of the NCAA to sell TV rights
8 violated section 1. Just as with the NFL, the
9 decisions of the NCAA were ultimately controlled by
10 the vote of its members, and for that reason, the
11 Court held that the NCAA policy was a horizontal
12 restraint, and it --

13 JUSTICE SOTOMAYOR: But there was no joint
14 venture with respect to the television rights, meaning
15 there was no separate activity, other than the
16 televising of the shows at issue. Here, the Solicitor
17 General is saying there is a joint venture, and it has
18 to do with the licensing of trademarks, with their
19 quality control, et cetera.

20 Isn't that a substantial difference?

21 MR. NAGER: No, I don't -- I don't think so,
22 because what we're -- what we're asking about here is
23 -- is the question of whether or not the agreement of
24 the teams involves a plurality of actors. And just as
25 in NCAA, the members' institutions -- because they

1 controlled the operation of the NCAA and the policy
2 that it was promulgating, there was a plurality of
3 actors.

4 So, too, here, the 32 teams of the National
5 Football League have entered into an agreement and
6 control the use, collectively, of the trademarks and
7 logos of the individual teams. And for that reason,
8 there is concerted activity that is involved.

9 Justice Sotomayor, the point that you raise
10 might be of -- a point of difference that the NFL
11 could argue in the context of an ancillary restraint
12 analysis, in the context of a rule of reason analysis,
13 but it's not a point of distinction that they can
14 argue properly in the context of the concerted conduct
15 inquiry.

16 The NCAA case simply applies the consistent
17 teachings of this Court in cases like Sealy, BMI, and
18 Copperweld, that separately owned and controlled
19 entities entering into agreements -- those agreements
20 constitute concerted conduct subject to scrutiny under
21 the antitrust laws. The --

22 JUSTICE GINSBURG: Does that cover
23 everything that the NFLA does? Because everything is
24 subject to agreement. It's all concerted action. So,
25 is everything under the Sherman Act, and then it goes

1 to rule of reason analysis? Or are there some things
2 that escape, entirely, antitrust analysis?

3 MR. NAGER: Certainly everything in the --
4 that's challenged in this case, because this involves
5 a restriction on the activities of the venturers
6 themselves. But more generally, I would -- I would
7 answer your question, Justice Ginsburg, to say that
8 yes, that everything that these 32 separately owned
9 and controlled teams joined together to do by -- in
10 concert, by agreement, by consent, is a contract.

11 JUSTICE KENNEDY: Do changes in the -- in
12 the rule apply? They make a change to make it -- give
13 the passer more protection, but there's -- this really
14 hurts certain teams, which mostly run, and so -- rule
15 of reason?

16 MR. NAGER: Yes, it is concerted activity.
17 I don't think it would be a plausible rule of reason
18 claim.

19 JUSTICE KENNEDY: Well, how -- you know the
20 litigation system. How do we know?

21 MR. NAGER: Well, I think we know the
22 following, Justice Kennedy: That under this Court's
23 rule of reason jurisprudence, a plaintiff has to be
24 able to plead an identifiable anticompetitive effect
25 in a market in which the defendant plausibly has

1 market power, and the -- the plaintiff also has to be
2 one who can --

3 JUSTICE KENNEDY: Well, my -- my
4 hypothetical: Two or three teams which aren't
5 particularly popular in the league are hurt by the
6 rule change. And --

7 MR. NAGER: That --

8 JUSTICE KENNEDY: And notice, there's --
9 that the owners sit around the room, they are liable
10 for a conspiracy. I mean, this is serious stuff.
11 Triple damages.

12 I don't -- and my question, really, was the
13 same as Justice Ginsburg's. Can you give us a zone
14 where we are sure a rule of reason inquiry will be --
15 would be inappropriate? We can take care of it on
16 summary judgment. Because if you don't have some sort
17 of section 1 carve-out for joint action, then -- then
18 everything is under the rule of reason.

19 MR. NAGER: Well, Justice Kennedy, let me
20 answer your question in two parts. First of all, to
21 the extent that the Court is looking for a zone, the
22 concerted conduct doctrine is the wrong place to do
23 it, because remember, if something is deemed not to be
24 concerted conduct, it is a per -- then it's per se,
25 not subject to section 1 and per se legal. And I

1 think for the Court's jurisprudence over the last
2 30 years, the Court has been trying to get out of per
3 se rules and have a more focused inquiry into what the
4 anticompetitive effects and pro-competitive effects of
5 a particular restraint are. The concerted conduct
6 doctrine would be a very blunt tool to use for that
7 purpose.

8 Now, that is not to say -- and I appreciate
9 your question -- in the NCAA case itself, where
10 conditions of competition and the like were raised,
11 Justice Stevens's opinion for the Court says that in
12 contrast to the TV restraint, these other types of
13 rules and regulations of the sports league are
14 presumptively competitive, pro-competitive,
15 presumptively favorable to consumers, because they are
16 integral and bound up with the creation of the
17 football venture itself.

18 JUSTICE ALITO: Well, let me give you
19 another example that you mention in your brief. The
20 NFL teams agree among themselves regarding scheduling:
21 They'll play 16 games a year and they will have a
22 playoff schedule and they won't play any other games.
23 Now, would that be a clear case under the rule of
24 reason? You mention and some of your amici mention
25 that, for example, the English football leagues

1 operate very differently.

2 MR. NAGER: Justice Alito, if I -- I may not
3 have gotten all of your question, but let me answer it
4 in two parts. The antitrust laws do not require joint
5 ventures to maximize output. They don't require joint
6 ventures to maximize competition. They simply
7 prohibit people entering into contracts from
8 unreasonably restraining trade.

9 So a mere agreement among the team owners
10 that they would have a 14-game schedule rather than a
11 16-game schedule is not a prima facie showing of an
12 anticompetitive impact, because all it's showing us is
13 what the joint venturers have done with their own
14 output. They have -- you haven't alleged a
15 market-wide reduction in output. Now, if by your
16 question you were saying, in addition --

17 JUSTICE ALITO: Well, what if one of the
18 team wants -- one of the teams wants to play
19 additional games --

20 MR. NAGER: Well --

21 JUSTICE ALITO: -- against a rival team
22 where they will get more money?

23 MR. NAGER: What I -- what I was going to
24 jump right to is: If in addition to changing the
25 league schedule, the team owners in concert agreed to

1 prohibit the teams of the National Football League
2 from -- from playing any other games -- doing an
3 exhibition game in Japan, the Redskins and the Giants
4 playing another game -- that might show a market-wide
5 reduction in output. And the Court's decision in NCAA
6 says very specifically that the most important
7 condition of ensuring the competitiveness of joint
8 ventures is ensuring the freedom of the individual
9 venturers to produce output, increase output.

10 Now, that doesn't mean that a league rule of
11 that type would be unlawful. All I'm trying to
12 suggest is if, in addition to changing the schedule of
13 games for the league, they also imposed a restriction
14 on the individual venturers from producing additional
15 games on their own, we might have something that
16 looked more like a plausible rule of restraint --

17 JUSTICE SOTOMAYOR: They couldn't -- they
18 couldn't stop that team from joining another league?
19 Let's assume -- and I -- you know, I don't know enough
20 about football, but let's assume there are two leagues
21 playing. One of them plays on Saturday and the other
22 plays on Sunday. You're suggesting that the venture
23 couldn't stop their members from joining that other
24 league? What's the purpose of being in a venture if
25 -- if you are free to reject it and go to somewhere

1 else?

2 MR. NAGER: What I'm saying is, first of
3 all, it would plainly be concerted activity on the
4 part of the team owners because they would have
5 entered into a horizontal restraint on the activity of
6 the venturers. Whether or not that horizontal
7 restraint violated the antitrust laws, one would have
8 to go through the following analysis, Justice
9 Sotomayor: First, we would ask whether that
10 restriction is an ancillary -- an ancillary restraint.

11 And an ancillary restraint, starting with
12 Judge Taft, later Chief Justice Taft's, opinion in the
13 Addison Pipe case, is: Is that restraint reasonably
14 necessary to achieve the efficiency-enhancing purposes
15 of the joint venture and is it no broader than
16 necessary?

17 CHIEF JUSTICE ROBERTS: It seems --

18 MR. NAGER: And if it is, then we would
19 analyze that restraint by reference not only to its
20 own pro-competitive benefits and anticompetitive
21 effects; we would analyze it by reference to the
22 benefits of the joint venture as a whole.

23 CHIEF JUSTICE ROBERTS: Counsel, it seems to
24 me -- your last few answers seem to me to beg the
25 question. You start out by saying, well, obviously

1 it's a horizontal agreement among the teams, and then
2 you explain how you are going to analyze it.

3 I thought that was the very question before
4 us: Whether these sorts of rules and regulations are
5 horizontal agreements between the teams or whether
6 they are part of a particular -- a single entity's
7 articulation of rules.

8 MR. NAGER: Well, Mr. Chief Justice, you are
9 exactly right, and the real --

10 CHIEF JUSTICE ROBERTS: That you have been
11 begging the question? Is that -- that part?

12 (Laughter.)

13 MR. NAGER: Well, let me try to address
14 Justice Sotomayor's subsequent question in the context
15 of the way you are posing the question,
16 Mr. Chief Justice.

17 The reason it's a horizontal restraint is
18 because these -- under the Court's doctrine,
19 consistent teachings, whether it be Sealy, BMI,
20 Copperweld, these teams are separately owned. They're
21 separate decision-makers joining together, and they're
22 making a decision about how they are going to jointly
23 produce something or not produce something. And
24 that's what makes it concerted activity under this
25 Court's consistent teachings. The distinction between

1 unilateral activity under section 1 and concerted
2 activity under section 1 has consistently been the
3 distinction between ownership integration of assets --

4 JUSTICE STEVENS: Can I --

5 MR. NAGER: -- and contract integration of
6 assets.

7 JUSTICE STEVENS: Can I interrupt with this
8 question? Is it not part of your burden not only to
9 argue there are multiple actors, but also that their
10 agreement has an adverse effect on competition?

11 MR. NAGER: It -- absolutely, as the
12 plaintiff in the case, Justice Stevens, that we do.
13 That is not the ground of decision of the court below.

14 JUSTICE STEVENS: I understand it isn't, but
15 it is part of your burden to say this is not a pro-
16 competitive agreement.

17 MR. NAGER: Absolutely. And I'm not --

18 JUSTICE SCALIA: But not -- not here.

19 MR. NAGER: In the -- I'm sorry, Justice --

20 JUSTICE SCALIA: Not here.

21 MR. NAGER: I -- I don't have to argue -- I
22 mean, I don't think I have to argue in this Court. I
23 just have to answer your questions, but --

24 JUSTICE STEVENS: Well, you at least have to
25 relate it.

1 JUSTICE SCALIA: If -- if we find for you
2 and it goes back, then you would -- you would bear
3 that burden.

4 MR. NAGER: That's correct. And, in fact,
5 in this case, Justice Stevens, I would point out that
6 the NFL initially moved to dismiss the -- the rule of
7 reason count on the ground that it didn't state a
8 cognizable, plausible rule of reason claim, and the
9 district court judge denied that motion.

10 He found that the complaint alleged a market
11 in which he could not say, as a matter of law, that
12 the NFL defendants did not have market power, and he
13 recognized that the -- that the teams had agreed
14 together to prohibit competition in an aspect of their
15 licensing activity and in an aspect of their
16 merchandising activity.

17 JUSTICE SCALIA: How does it work?

18 JUSTICE STEVENS: But what if he -- what if
19 he further concluded that the agreement had the
20 overall effect of stimulating additional -- it was
21 pro-competitive in that it would equalize the economic
22 strength of the teams and, therefore, made them all
23 better competitors on the playing field? Would that
24 have been a defense?

25 MR. NAGER: I'm sorry, Justice Stevens, I'm

1 not quite sure. I thought you were saying if in the
2 response to a motion to dismiss --

3 JUSTICE STEVENS: Right.

4 MR. NAGER: -- he had -- had held --

5 JUSTICE STEVENS: He said: Sure, there's an
6 agreement here, but the burden is on the plaintiff to
7 show that the agreement has an adverse effect on
8 competition. And that the -- as I understand the
9 facts, you've -- there's revenue sharing here, isn't
10 there? That they -- they all share in the product of
11 the sales of the joint product?

12 MR. NAGER: Well, let me explain what
13 they've done, and I will then explain why it does have
14 a -- identifiable anticompetitive effects, which
15 certainly satisfy the pleading standards for a rule of
16 reason claim.

17 What the teams did here was they got
18 together and they agreed that they would not
19 themselves individually license their trademarks or
20 logos. They agreed that they -- under -- the current
21 market system included the issuance of multiple
22 blanket licenses. They would eliminate all but one of
23 those blanket licenses from the market, and they would
24 give it in the exclusive control of Reebok, and they
25 would limit the circumstances in which they competed

1 against each other and with Reebok, and said --

2 JUSTICE BREYER: All right. So I thought --
3 I thought -- as I read your complaint, almost every
4 word of it had to do with pro -- per se violations.
5 So I forget those here, right?

6 MR. NAGER: The per se violation was
7 dismissed and --

8 JUSTICE BREYER: You forget -- just yes or
9 no. I forget it. Okay.

10 MR. NAGER: -- is not before the Court.

11 JUSTICE BREYER: Now, I've suddenly heard
12 you talk -- the only thing left I could see was where
13 you say, by their agreement to grant an exclusive
14 license to Reebok, they unreasonably restrained trade
15 in the markets. That's what I'm supposed to focus on?

16 MR. NAGER: Well, no. What I -- what I
17 would say, Justice --

18 JUSTICE BREYER: What other paragraph do you
19 want me to focus on?

20 MR. NAGER: Well, what I would point you to
21 is the statement -- I mean, if --

22 JUSTICE BREYER: No, I'm interested in the
23 complaint at the moment.

24 MR. NAGER: What the complaint talks about
25 is the granting of an exclusive license here.

1 JUSTICE BREYER: Yes. Okay. So I'm looking
2 at the complaint.

3 MR. NAGER: -- with the exclusivity as to --

4 JUSTICE BREYER: Fine. I get the point.
5 I'm asking a question. And I just heard you say that
6 you want, for example, were it -- you want the
7 Patriots to sell T-shirts in competition with the
8 Saints, or whoever. The Red Sox. All right. You see
9 the point? The Red Sox -- I know baseball better.

10 (Laughter.)

11 JUSTICE BREYER: You want the Red Sox to
12 compete in selling T-shirts with the Yankees; is that
13 right?

14 MR. NAGER: The ability to compete. Yes.

15 JUSTICE BREYER: Yes. Okay. I don't know a
16 Red Sox fan who would take a Yankees sweatshirt if you
17 gave it away.

18 (Laughter.)

19 JUSTICE BREYER: I mean, I don't know where
20 you're going to get your expert from who's going to
21 say there is competition --

22 MR. NAGER: Well --

23 JUSTICE BREYER: -- between those two
24 products. I think they would rather -- they would
25 rather wear a baseball, a football, a hockey shirt.

1 MR. NAGER: I understand the -- the point.

2 JUSTICE BREYER: But you're going to go back
3 and prove that actually there is competition between
4 those --

5 MR. NAGER: Well, I understand the point you
6 are making. I would also make the point that --

7 JUSTICE BREYER: Yes. Is that what this
8 case is about?

9 MR. NAGER: In part. But you've got to
10 recognize what the competition is for. The
11 competition is for fans. And the fact of the matter
12 is you're right that someone who has lived in New York
13 City for a long time is unlikely to be a Red Sox fan
14 and easily be persuaded to be a Red Sox fan, but the
15 person who is 3 years old can easily be persuaded.

16 JUSTICE BREYER: They have very small
17 allowances, the 3-year-olds.

18 (Laughter.)

19 JUSTICE BREYER: All right. You think -- I
20 guess you have a right to that. I'm not -- you have a
21 right, but that's what you're going to have to try --

22 MR. NAGER: Well --

23 JUSTICE BREYER: -- to prove: That they're
24 --

25 MR. NAGER: But the other point I would make

1 is --

2 JUSTICE BREYER: Yes.

3 Mr. NAGER: -- that's just showing that each
4 team has substantial market power.

5 JUSTICE BREYER: Yes.

6 Mr. NAGER: And again, they --

7 JUSTICE BREYER: But I'm trying to look --
8 what I'm trying to get in my mind is what specific
9 restraint you are focusing on.

10 You listed three or four, and one of them is
11 you want, in effect -- I'm joking about it, but it's
12 true -- you are arguing that the Yankees should
13 compete with the Red Sox in selling shirts.

14 Another thing you are complaining about,
15 which is the one I understand less, is that these
16 teams got together and they agreed that they would
17 just have one person sell all this stuff together.
18 And what you think is that they individually should
19 have decided whether to choose that one person, or
20 maybe to choose two people, or three.

21 MR. NAGER: We --

22 JUSTICE BREYER: Is that right?

23 MR. NAGER: Not quite.

24 JUSTICE BREYER: No.

25 JUSTICE SCALIA: Mr. Nager, do I have to

1 figure this out here? Is --

2 MR. NAGER: No.

3 JUSTICE SCALIA: Is this issue before us
4 here? Or is it just the issue of whether the lower
5 court was wrong to dismiss your suit on the basis that
6 this is a unitary operation?

7 MR. NAGER: You're --

8 JUSTICE SCALIA: I thought that was the only
9 issue.

10 MR. NAGER: That is the only issue,
11 Justice Scalia.

12 JUSTICE SCALIA: Well, why am I worrying
13 about this other stuff?

14 MR. NAGER: Because counsel has an
15 obligation to respond to questions.

16 (Laughter.)

17 JUSTICE BREYER: I find --

18 MR. NAGER: I appreciate, Your Honor --

19 JUSTICE BREYER: I find it easier --

20 Mr. NAGER: You'd be a good blocker.

21 JUSTICE BREYER: -- to think about the case
22 if I know what's going on. And I'm not certain this
23 is irrelevant, but given Justice Scalia's persuasive
24 remark, I will withdraw my question.

25 (Laughter.)

1 MR. NAGER: Thank you, Justice Breyer.

2 JUSTICE KENNEDY: Well, but it seems to me
3 what we are doing is exploring the consequences of
4 completely discarding the unitary theory.

5 MR. NAGER: Well, we're not --

6 JUSTICE KENNEDY: And so -- and the earlier
7 questions, it seemed to me, were helpful. The
8 Saturday/Sunday scheduling issue, it seems to me,
9 pretty clearly on its face does limit competition.
10 You -- you have one day instead of two days.

11 Then Justice Stevens said: Suppose it makes
12 them better players because they are rested and so
13 they can perform better. I take it that was the
14 purpose of the question. And I -- I still don't get
15 any answers. I don't know where we are with this.

16 MR. NAGER: The answer to --

17 JUSTICE KENNEDY: And -- and it's a
18 difficult area, but I'd like -- and -- but I'd like
19 some guidance.

20 MR. NAGER: Well, the guidance I would give
21 you, Justice Kennedy, is that as Justice Scalia says,
22 the only question before the Court is whether or not
23 these agreements constitute concerted activity. They
24 plainly do, because they are agreements between
25 separately owned and controlled competing businesses.

1 JUSTICE GINSBURG: Mr. Nager, I think you
2 answered my question originally: Yes, everything.
3 Because they are separate entities, they agree on
4 everything. There's agreement in every case. So
5 there's nothing you would take outside, and you would
6 put everything under the rule of reason analysis.

7 MR. NAGER: That -- that is correct. But
8 that doesn't mean that the rule of reason is some
9 unstructured, indeterminate --

10 JUSTICE GINSBURG: One -- one concern in the
11 litigation is, you know, if it doesn't come under the
12 Sherman Act at all, they go home after the case is
13 dismissed on the -- on the pleadings.

14 But once you say no, it's got to be a rule
15 of reason analysis, then you have discovery, which can
16 be costly. And I thought that that was a feature of
17 this case, that the -- that the plaintiff wanted more
18 discovery, and the court said: You've had enough.

19 MR. NAGER: Well, no. The -- the judge only
20 allowed discovery on the single entity issue. He did
21 not allow discovery on -- on the rule of reason
22 question. So there's been -- not been -- discovery on
23 the substance of the case has not been conducted.

24 So in that regard, the question of how the
25 case would be managed going forward is something that

1 would be in the hands of the district court on remand
2 from this Court and the court of appeals, after this
3 erroneous conclusion that the agreements don't
4 constitute concerted conduct is put to the side.

5 CHIEF JUSTICE ROBERTS: Counsel, could you
6 articulate for me as succinctly as possible the extent
7 to which your position departs from the position of
8 the Solicitor General?

9 MR. NAGER: The Solicitor General's position
10 is correct insofar as it criticizes the Seventh
11 Circuit's reasoning.

12 The test that the Solicitor General proposes
13 is conceptually and doctrinally unsound, and it will
14 create a lack of clarity where there presently exists
15 clarity in the cases, and it will produce inefficiency
16 and waste in the conduct of litigation that does not
17 presently exist. And I could give --

18 CHIEF JUSTICE ROBERTS: Well, I would have
19 thought it's just the transfer of the inefficiency and
20 lack of clarity from the -- the first question to the
21 rule of reason. I mean, I'm not quite sure it -- you
22 don't have the same problem. It's just a question of
23 where you want to rest the inefficiency and confusion.

24 MR. NAGER: Well, I understand your point,
25 Mr. Chief Justice: That to the extent that rule of

1 reason inquiries are not as refined as they need to
2 be, since the Solicitor General's concerted conduct
3 inquiry includes rule of reason inquiries -- indeed,
4 on its effective merger standard, it says it has to
5 survive a rule of reason analysis or somehow be
6 waived, or you would have to do it as part of the
7 concerted conduct inquiry, so that there is no doubt
8 to the extent that -- that the rule of reason is a
9 continuing project of this Court, we would be
10 transferring some of that project into the concerted
11 conduct inquiry.

12 With all respect, Mr. Chief Justice, I don't
13 think that would be a healthy development in the law.
14 The courts actually understand the concerted conduct
15 doctrine as it presently exists.

16 CHIEF JUSTICE ROBERTS: Well, I -- I thought
17 the purpose of their submission was to respond to some
18 of the questions we've seen, like scheduling, like
19 what the rules are going to be about, about the game.
20 There are some things that it just seems odd to
21 subject to a rule of reason analysis. And you
22 yourself have said: Well, that's going to be an easy
23 case under the rule of reason. Why doesn't it make
24 sense to sort of carve those out at the outset, rather
25 than at the end of the case?

1 MR. NAGER: Well, I think the answer is, you
2 should -- you should use English language and doctrine
3 to address the issue that you are actually trying to
4 address, rather than call it something else.

5 Right now, we have an antitrust doctrine
6 that says you've got to have concerted conduct and you
7 have to have an unreasonable restraint of trade. We
8 have courts that understand how to apply this Court's
9 cases on concerted conduct. This Court, for
10 understandable reasons, is sensitive to the fact that
11 the rule of reason is not quite as well understood and
12 is an evolutionary doctrine, perfectly well understood
13 by me.

14 There are certain issues that this Court has
15 said come up in a rule of reason analysis and, to
16 quote the Court from Cal. Dental, "can be dealt with
17 in the twinkling of an eye"; that is, some claims, as
18 the NCAA Court said, are not going to be serious rule
19 of reason claims and can be dismissed on the
20 pleadings. The Court said that in Twombly as well.

21 JUSTICE STEVENS: And as I understand your
22 position, that could be the result in this case. We
23 don't know whether the district court was right or
24 wrong in what he did on the -- on the rule of reason
25 issue.

1 MR. NAGER: In terms of what this Court --
2 obviously, on my client's behalf, I have to vigorously
3 state to the Court we think we have a bona fide,
4 serious rule of reason claim -- but, yes, Justice
5 Stevens --

6 JUSTICE STEVENS: And one thing I wondered
7 about the record: There is discussion in the briefs
8 about the fact that the teams share the revenues from
9 these -- these sales. Is that -- how did that get in
10 the record, the revenue sharing aspect of their -- of
11 the different teams' participation?

12 MR. NAGER: Well, I -- I didn't handle the
13 case below, so I don't quite know how it got into the
14 record. It is my -- certainly my understanding that
15 there is an affidavit in the record that says that the
16 revenues that the NFLP entity receives are distributed
17 to the teams in equal shares, so that that --

18 JUSTICE STEVENS: Would -- wouldn't that --
19 that affidavit support the conclusion that this is
20 basically a pro-competitive agreement because it tends
21 to make competition stronger on the playing field,
22 and, therefore, that's a sufficient defense under the
23 rule of reason, and that's the end of the ball game?

24 MR. NAGER: I -- I think not. You have to
25 remember that that agreement to not compete and have

1 only one entity --

2 JUSTICE STEVENS: Yes, but you are not just
3 competing --

4 MR. NAGER: That's the very thing the case
5 challenges.

6 JUSTICE STEVENS: But with regard to sales
7 of the paraphernalia and so forth that you have here,
8 you're not just competing among the members of the
9 league; you're competing in a market that includes all
10 sports paraphernalia.

11 MR. NAGER: No, our market was alleged and
12 held not to be legally invalid by the district court,
13 to be NFL-logoed hats and apparel.

14 JUSTICE STEVENS: That assumes there is no
15 competition between the sales of those logos and the
16 sales of other sports logos.

17 MR. NAGER: Well, that -- that's correct.
18 And the district court judge held that that was a --
19 based upon this Court's decision in NCAA and the
20 International Boxing case, was a plausible market to
21 allege in which the NFL teams had market power. And
22 so it would be a question for the district court
23 managing the case going forward to determine whether
24 or not that was a factually supportable market.

25 JUSTICE SOTOMAYOR: Counsel, you -- the

1 Solicitor General is asking us to remand under his new
2 test to find out whether you are challenging the joint
3 venture or challenging simply the licensing to one
4 individual or one entity. What are you doing? Do you
5 have an answer to that?

6 MR. NAGER: Well, the -- the answer is --

7 JUSTICE SOTOMAYOR: Meaning -- I don't --

8 MR. NAGER: I understood -- that the
9 American Needle said in the court below that what it
10 was challenging was the grant of an exclusive license
11 to NFLP that prohibited the individual team
12 competition and limited all competition in the market
13 in blanket licenses.

14 When the case came to this Court, on page 2
15 of the orange brief, the NFL said they understood
16 exactly what our case was -- this is on page 2, the
17 second sentence: "American Needle alleged that the
18 decades-old agreement among the member clubs to
19 collectively market such intellectual property was
20 unlawful under Sections 1 and 2 of the Sherman Act, at
21 least after the 2001 decision to collectively license
22 the marks to a single headwear manufacturer."

23 The NFL stood -- understood exactly what we
24 were arguing, and they have understood it throughout
25 this case, as did the lower courts. I'm not quite

1 sure why the Solicitor General doesn't understand it.

2 JUSTICE GINSBURG: Is your point that your
3 client wasn't hurt until they dealt exclusively with
4 one manufacturer?

5 MR. NAGER: That's correct,
6 Justice Ginsburg.

7 JUSTICE GINSBURG: So you have nothing --
8 you had no damages before?

9 MR. NAGER: Before.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Nager.

12 Mr. Stewart.

13 ORAL ARGUMENT OF MALCOLM L. STEWART

14 ON BEHALF OF THE UNITED STATES

15 AS AMICUS CURIAE, SUPPORTING NEITHER PARTY

16 MR. STEWART: Mr. Chief Justice, and may it
17 please the Court:

18 I think that by focusing on a rather mundane
19 aspect of the NFL commissioner's powers, this may help
20 to explain why the United States is not four-square in
21 support of either party's theory in this case. Among
22 the powers that is vested in the commissioner by the
23 NFL -- by the NFL constitution is the power to incur
24 expenses to carry on the ordinary business of the
25 league, and this includes renting office space, hiring

1 employees, and procuring supplies.

2 And if the commissioner, pursuant to that
3 delegation of authority, decides from which company
4 he's going to -- to acquire paper for the league's
5 offices or decides what the wage scale for secretaries
6 in the league offices should be, our view is that
7 that's the conduct of a single entity. It may be that
8 the commissioner's power to do those things is
9 ultimately derived from the consent of the individual
10 teams within the league, but once that consent has
11 been given, once that authority has been centralized,
12 then the commissioner's decision about a paper
13 supplier or wages for employees --

14 JUSTICE BREYER: And then the question I
15 have -- I now understand this much better in light of
16 that. And -- but I don't -- and -- and I see your
17 point. What I'm not certain about is: Is it better
18 to characterize it as a single entity, in which case
19 we get into the kind of confusion that I think exists
20 in this case? Or just say, look, it's a joint
21 venture?

22 If Panagra creates a joint venture, of
23 course they are going to buy things like office space
24 and employees, so it's reasonable by definition. We
25 don't even look into it. Those things that are close

1 enough -- take your criteria from 17, page 17, which
2 are excellent criteria in my mind, and you say these
3 are the criteria by which we decide whether those
4 ancillary parts of a joint venture that is itself
5 reasonable are also reasonable.

6 MR. STEWART: I guess we would say two
7 things: The first is, up until now there has been no
8 such thing in the law as concerted action that is per
9 se legal or per se reasonable.

10 JUSTICE BREYER: No, no. We wouldn't say
11 per se. We are saying that the justification here:
12 They are reasonable. Why are they reasonable?
13 Because there is a legitimate joint venture, and this
14 is an ancillary part of that legitimate joint venture.

15 People can attack it, but it's going to be
16 no easier to attack than if they tried to attack what
17 you call a single entity.

18 MR. STEWART: I guess my point is that if,
19 for instance, a disappointed bidder for the paper
20 supply conduct -- contract challenged this as a
21 section 1 violation and said the commissioner's
22 decision to go to Staples rather than Office Depot was
23 unreasonable --

24 JUSTICE BREYER: I see.

25 MR. STEWART: -- because Office Depot was

1 offering a better product at a lower price -- that
2 there are certainly decisions that the commissioner
3 could make with respect to procurement of supplies or
4 the setting of wage levels that would be unreasonable
5 in a business judgment sense, in that they wouldn't
6 effectively carry on the mission of the organization,
7 but they wouldn't be unreasonable in the -- the
8 section 1 sense.

9 And the other thing I would say is that line
10 of argument could have been made in Copperweld; that
11 is, the Court could have concluded that --

12 JUSTICE BREYER: Copperweld -- look, your
13 second criteria opens it up to attack in precisely the
14 same way that my use of rule of reason does, because
15 they are going to have to show it doesn't
16 significantly affect actual or potential competition.
17 Therefore, they file their claim; they say they win
18 under the second criteria. That's precisely the same
19 as a person filing his claim and saying it's
20 unreasonable.

21 We are only talking terminology, but what
22 worries me about this is the terminology, because I
23 think that the lower courts have taken Copperweld
24 terminology and transferred it to a place where it
25 does, I think, perhaps not belong.

1 MR. STEWART: Well -- well, in Dagher, for
2 instance, the Court was dealing with a situation
3 that's in some ways analogous to the one that you have
4 here; that is, a joint venture in which entities that
5 were economic competitors in some aspects of their
6 businesses joined forces with respect to other
7 aspects. And the Court in Dagher didn't squarely
8 resolve these questions, whether section 1 applied,
9 but it said that in pricing its products, Equilon, the
10 joint venture, was acting as a single firm, a single
11 entity.

12 But the other point I would like to make
13 about my -- my paper and employee example is that, in
14 our view, the NFL commissioner, when carrying out
15 those functions on behalf of the league, would be
16 acting as a single entity, even though his power was
17 derived from the consent of the teams. But if the Jets
18 and the Giants agreed among themselves as to what
19 wages they would pay their secretaries or from whom
20 they would buy paper, that would be an entirely
21 different thing. The fact that those teams are for
22 some purposes part of a --

23 JUSTICE STEVENS: May I ask you this
24 question, Mr. Stewart? Would the antitrust issue
25 before us be any different if instead of giving an

1 exclusive contract to one purveyor of the product, the
2 commissioner had entered into a multitude of different
3 contracts, but specified a minimum price in every one
4 he specified?

5 MR. STEWART: I think the section -- the
6 question of whether section 1 applied would not be any
7 different; that is, the central section 1 that --

8 JUSTICE STEVENS: So the fact that this is
9 an exclusive agreement is kind of a red herring in
10 this case, isn't it?

11 MR. STEWART: It -- it may not be a red
12 herring with respect to the ultimate resolution of the
13 case; that is, if the court on -- the lower court, on
14 remand, if the case were remanded, applied rule of
15 reason analysis, the -- the precise nature of the
16 contract might bear on whether the restraint was
17 reasonable, but it wouldn't bear on the question of
18 whether concerted activity was involved; that is,
19 what --

20 CHIEF JUSTICE ROBERTS: I don't -- I'm
21 sorry. I didn't mean to interrupt your answer.

22 MR. STEWART: I guess my point was, once --
23 once the teams decided that they would -- rather than
24 each negotiating individually, either with a single
25 licensee or with multiple licensees, once they decided

1 they would negotiate as a collective and that any
2 potential licensee had to go to the collective rather
3 than to the individual teams, that's the central
4 section 1 issue. And if the -- the collective had
5 decided, we will give contracts to a multitude of
6 potential bidders, that would not have affected the
7 fact that concerted action was involved.

8 CHIEF JUSTICE ROBERTS: So under your --
9 following of your paper case, are you saying that if
10 the teams delegated to the commissioner the authority
11 to decide whether we are going to enter -- whether the
12 league is going to enter into one contract on logo
13 products or let each team decide, that would be all
14 right?

15 MR. STEWART: That would -- that initial
16 delegation of authority would be subject to a
17 section 1 challenge, because that would be concerted
18 action in the same way that the Court in Dagher
19 said --

20 CHIEF JUSTICE ROBERTS: Well, why isn't the
21 decision to order paper from one company rather than
22 another subject to section 1 challenge?

23 MR. STEWART: Because that -- that occurs
24 after the point at which the commissioner has been
25 vested with that authority.

1 If somehow a plaintiff wanted to say there
2 was an -- there was illicit concerted action when the
3 teams agreed to give the commissioner this general
4 power, that would be subject to section 1 review. It
5 seems -- because that would be concerted action. It
6 seems highly unlikely that such a challenge would
7 prevail. But if --

8 CHIEF JUSTICE ROBERTS: Why is that? I
9 mean, if I'm Office Depot and I'm selling paper to
10 the -- to the Giants -- or does this only apply to the
11 commissioner's office?

12 MR. STEWART: This only applies to carrying
13 out the ordinary business of the league. It -- it
14 would only apply to the commissioner's running of --
15 of the league office, not the running of the
16 individual teams. And as I say, our central point is
17 that --

18 JUSTICE SOTOMAYOR: Could -- using your
19 example, could you tell me what the different
20 questions would be under the single control theory
21 you're proposing and a rule of reason application in
22 its normal course? So, what are the questions you
23 would ask under your theory, and how do they differ
24 from what would happen under a rule of reason
25 analysis?

1 MR. STEWART: I guess under our theory, we
2 would first ask, as to an entity like this, which is
3 entities that compete in some respects with --

4 JUSTICE SOTOMAYOR: Let's -- let's not go
5 into this case. Let's -- let's stay with your single
6 commissioner.

7 MR. STEWART: I think we would ask first:
8 Is -- is the commissioner acting as a single entity
9 when he exercises delegated authority in making a
10 business judgment about which supplier to buy paper or
11 what the wages should be?

12 If the answer is yes, then the section 1
13 inquiry is over, then the case is no different from a
14 challenge to the --

15 JUSTICE SOTOMAYOR: Well, how does that stop
16 any group of competitors from coming in and saying:
17 Gee, I want to sell my gas; I'm going to let this
18 single commissioner decide how much my gas will sell
19 for, and if he chooses to sell it at the same price to
20 everybody, both gas products, that's okay. How do you
21 get to that?

22 MR. STEWART: Well, I think if a single
23 business is deciding whether to buy paper from one
24 supplier or from several, that wouldn't be subject to
25 section 1 review, because the decision of the single

1 business might affect the welfare of the competitors,
2 but it wouldn't be concerted action.

3 And our point is that when -- I think the
4 way in which our position differs from that of the two
5 parties is that on the one hand, I think it is the
6 logical implication of Petitioner's position that
7 because the commissioner's authority to buy supplies
8 for the league or hire referees for the league is
9 ultimately derived from the consent of the individual
10 teams who are independently owned, the logic of
11 Petitioner's position suggests that that would be
12 subject to section 1 scrutiny.

13 On the other hand, the logic of the NFL's
14 position suggests that because the commissioner can
15 set price, can decide from whom to buy paper on behalf
16 of the league, the Jets and the Giants could reach a
17 similar agreement, and the -- or the Jets and the
18 Giants could agree on the prices they will pay
19 secretaries --

20 CHIEF JUSTICE ROBERTS: No, no, no, no,
21 because they are not part of the broader concerted
22 entity. There's no separate -- you're saying, well,
23 just because all 32 teams can act as -- as an
24 individual entity, any group of those teams can act as
25 an individual entity.

1 MR. STEWART: I think that follows logically
2 from the position that this is one entity. Because in
3 Copperweld, for instance, the Court noted that
4 coordination between different divisions of a single
5 company would not be subject to section 1 scrutiny,
6 and that implies not just that all the divisions could
7 get together, but that any two could confer among
8 themselves without raising section 1 concerns.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Levy.

11 ORAL ARGUMENT OF GREGG H. LEVY
12 ON BEHALF OF THE RESPONDENTS

13 MR. LEVY: Good morning, Mr. Chief Justice,
14 and may it please the Court:

15 The formation of a professional sports
16 league, like the formation of any joint venture, may
17 be subject to section 1 scrutiny. Were it not for an
18 act of Congress, the merger of the National Football
19 League and the American Football League in 1970 would
20 be one such example. But there is no challenge to
21 venture formation here.

22 There is no dispute that the NFL, including
23 its licensing arm, NFL Properties, is a lawful
24 venture. If venture formation is not an issue, then
25 decisions by the venture about the venture's product

1 are unilateral venture decisions, unilateral venture
2 actions. They are not concerted actions of the -- of
3 the venture's members.

4 JUSTICE KENNEDY: Well, do we have to ask
5 what was the intent at the beginning, as kind of an
6 originalism thing? Everybody sits around and says:
7 Let's have a football league. And 20 years later,
8 they say: You know, the sale of hats and shirts is a
9 pretty good thing; let's get into that business, too.
10 That would -- that would -- that's case 1.

11 Case 2 is, when they formed the league
12 initially, 30 years ago, they said: And be sure we
13 will sell hats, and -- I don't understand the base
14 point from which I find that this is a single entity.

15 MR. LEVY: Your Honor, we know here that at
16 least as of 1963, when NFL Properties was formed, that
17 there was a single entity formed, a single entity to
18 produce and promote NFL football.

19 Now, I take issue with your suggestion --
20 your implication that there was a decision made here:
21 Let's set up a separate line of business; we are going
22 to sell hats also. That's not what happened, and the
23 record on that is unambiguously clear here. It's
24 undisputed. Clubs --

25 JUSTICE KENNEDY: Well, do you take issue

1 with my question that this is a relevant inquiry? Is
2 it part of the original agreement or isn't it, and why
3 is it that the original agreement is somehow
4 sacrosanct? I don't understand.

5 MR. LEVY: I'm not suggesting that the
6 original agreement is sacrosanct. That's why I
7 suggested that by 1963 -- or the mid-1960s, when NFL
8 Properties was formed, there was venture formation at
9 that point.

10 At that point, what was the question? The
11 question was: How should the league, how should the
12 venture members, best promote the venture product?
13 And the decision was made to use the licenses of their
14 intellectual property as a promotional tool.

15 On that issue, the discovery and the record
16 below was undisputed. There is documentary evidence
17 from the NFL Properties' articles of incorporation.
18 There's testimony from an NFL executive, Mr. Herzog.
19 And the best proof, if there were any question about
20 that, is reflected in the -- the organic documents of
21 NFL Properties, which at the outset said that, if
22 there were any revenues from the licensing activities,
23 they would be donated to charitable and educational
24 causes.

25 Now, you know, Dagher confirmed the general

1 principle, but if the venture is lawfully formed, the
2 venture's decisions about how best to produce and
3 promote its product are venture decisions, not the
4 decisions of the venture members.

5 But Copperweld provides the framework that
6 decides the issue here, and neither Mr. Stewart nor
7 Mr. Nager mention Copperweld, except in passing.
8 Copperweld is the case by which this Court turned the
9 page, if you will, on the formalism of prior cases,
10 including Sealy, which Mr. Nager --

11 JUSTICE GINSBURG: May -- may I ask you to
12 go back just one step? Because you seem to treat this
13 as though the NFLP was formed in 1963 and that was the
14 end of it, but another description is: Well, it was
15 formed, but then there were some teams that were not
16 in it until later, and there were some other parts,
17 that it has expanded. What it does has expanded since
18 1963.

19 So it wasn't one point in time where there
20 was formation, and then if you didn't -- if you're not
21 challenging that, everything else is okay.

22 MR. LEVY: Well, I -- I don't disagree with
23 that, Your Honor. I think that in 1970, the league
24 expanded. There was a merger. That merger of the
25 National Football League and the American Football

1 League would have been subject to section 1 challenge
2 because it involved venture formation, but an act of
3 Congress said that that wasn't necessary.

4 After 1970, there have been six teams, I
5 believe, that have been added, essentially created, if
6 you will, like Adam's rib. They have been created
7 from the other NFL clubs, but it's essentially the
8 same venture. The venture has expanded its production
9 capability by adding new teams. It's expanded its
10 output by adding new teams.

11 And the role of licensing of intellectual
12 property throughout that process has remained the
13 same. The role has been to promote the venture's
14 product. It's not --

15 JUSTICE SOTOMAYOR: Excuse me. Did the
16 teams -- did the NFL Properties or some centralized
17 entity always exploit the trademarks of all the
18 franchises, or was there a long period of time in
19 which they each individually franchised their
20 products?

21 MR. LEVY: The record, Your Honor, says --
22 reflects that there was very little exploitation of
23 intellectual property of the franchises prior to the
24 creation of NFL Properties.

25 JUSTICE SOTOMAYOR: But there was some, and

1 that was done by the individual teams?

2 MR. LEVY: It was done, and it was done -- I
3 mean, that's sort of an historic artifact. It was
4 done, I believe collectively, through Roy Rogers
5 Enterprises. But the -- but the teams continued to
6 own their intellectual property. That's right.

7 JUSTICE BREYER: The problem, as I see, for
8 you in this case is that the basic conclusion is in
9 the court of appeals, where it says: "Viewed in this
10 light, the NFL teams are best described as a single
11 source of economic power when promoting NFL football
12 through licensing." Well, how do we know that?

13 MR. LEVY: Well --

14 JUSTICE BREYER: Their allegation is that
15 that isn't true. And I have -- and Copperweld just
16 seems to me to be very confusing on this, since --
17 since my hornbook knowledge of it was we have
18 Copperweld to deal with the case that we don't make
19 booths in department stores compete in price against
20 each other. All right?

21 Normally, however, we say independent
22 vendors can't get together and say they fix prices.
23 That's per se. And joint ventures are in the middle,
24 so we apply a rule of reason.

25 Now, very simple. I thought that has been

1 the law since Panagra. I don't know what, in fact,
2 Copperweld has to do with it. And they are saying
3 that this basic joint venture for promoting is not a
4 reasonable agreement. So why shouldn't they have
5 their shot? You might well win, but they want to make
6 that claim.

7 MR. LEVY: The reason we know that this is
8 not your typical joint venture is because Copperweld
9 established a standard that said that what section 1
10 is intended to regulate is not matters of form, not
11 general market conditions, but rather the sudden
12 joining together of independent sources of economic
13 power. That's --

14 JUSTICE BREYER: Fine, but that's the
15 conclusion here. That's not the -- that's the
16 conclusion. The question is: Should they be
17 permitted to join their centers of economic power into
18 one when they promote and sell their T-shirts,
19 sweatshirts, et cetera?

20 MR. LEVY: But --

21 JUSTICE BREYER: Now, you can't answer that
22 question by announcing the conclusion.

23 MR. LEVY: But, Your Honor, we know that
24 they are not independent sources of economic power,
25 because none of them can produce the product of the

1 venture on their own. No NFL club can produce a
2 single unit of production, a single game or --

3 JUSTICE BREYER: Well, can't it ask someone
4 to do that?

5 Oh. Oh, you are saying the game.

6 MR. LEVY: That's -- that's right.

7 JUSTICE BREYER: What does a game to do with
8 this? I thought we were talking about T-shirts and
9 helmets, and I -- I thought it's the simplest thing in
10 the world. You pick up the phone and say: Hello,
11 Shanghai, do you have a helmet?

12 (Laughter.)

13 MR. LEVY: Your Honor, if -- if this were a
14 venture designed to go out and license or manufacture
15 or distribute caps, you'd be right. But this is
16 different, and we -- the undisputed evidence in the
17 record below demonstrates it's different.

18 It's different because the purpose of the
19 licensing here is to promote the product. It's to
20 promote the game. And the NFL member clubs are not
21 independent sources of economic power in generating
22 that game.

23 JUSTICE BREYER: This is a summary judgment
24 motion?

25 MR. LEVY: Yes. It was a summary judgment.

1 JUSTICE SCALIA: Well, the stated purpose is
2 to promote the game. The purpose is to make money. I
3 don't think that they care whether the sale of the
4 helmet or the T-shirt promotes the game. They -- they
5 sell it to make money from the sale.

6 MR. LEVY: I --

7 JUSTICE SCALIA: Now, it promotes the game
8 if the money from the sale goes to the whole group, I
9 suppose. But -- but don't tell me that there is not
10 -- absent this agreement, there would not be an
11 independent, individual incentive for each of the
12 teams to sell as many of its own -- of its own shirts
13 and helmets as possible.

14 MR. LEVY: Your Honor, I'd agree with you
15 100 percent that the purpose of the licensing is to
16 make money, but not necessarily to make money through
17 the royalties. The purpose of the licensing is to
18 improve and promote the attractiveness of the game
19 product, to get more people interested in watching the
20 games on television, to get more people interested in
21 buying tickets to the game.

22 JUSTICE SCALIA: Well, I suppose that --
23 that could -- that issue could be tried.

24 MR. LEVY: And --

25 JUSTICE SCALIA: But I don't -- I don't

1 think so. And I suppose that's a triable issue, as to
2 whether the purpose of -- of selling these things is
3 to promote the whole NFL or to promote the particular
4 team.

5 MR. LEVY: And --

6 JUSTICE SCALIS: It wants its own adherents
7 and wants to sell its own product.

8 MR. LEVY: In the abstract, that's a triable
9 issue, Your Honor, but not here. Here, the record was
10 undisputed. There's evidence in the record on that
11 point. The record -- there was evidentiary -- there
12 was documentary evidence. There's evidence that goes
13 back to the organic documents of NFL Properties. And
14 as I mentioned before, in the early days, the -- the
15 net revenues, if any, the net royalties of the
16 licensing operations went to charity. So there's no
17 -- there's no question here. Discovery was allowed on
18 this issue, and the record is undisputed.

19 So we have a classic case, a perfect, clean
20 opportunity for this Court to apply the principles of
21 Copperweld and the principles of Dagher to an area of
22 the law that has been troubled for many years. Since
23 1984, the courts have wrestled with the question of
24 how to deal with professional sports leagues and
25 section 1 claims against professional sports leagues.

1 And the cases the courts have been -- have
2 -- and with the exception of this case and the Bulls
3 II case, the courts have been guided principally by
4 pre-Copperweld precedent that rests on an era of
5 formalism, an era when even an agreement between a
6 parent and its subsidiary --

7 JUSTICE SOTOMAYOR: What decision could the
8 sports teams make that would be subject to the
9 antitrust scrutiny under your definition of the
10 permissible range of the joint venture activities? It
11 seems to me that if the venture wanted to make sure
12 all the teams hired secretaries at the same
13 \$1,000-a-year salary, that under your theory, that's
14 okay, because it's a joint venture.

15 MR. LEVY: Your Honor, my view is that the
16 -- the NFL clubs are not separate sources of
17 independent power. As a result, they are a unit.
18 They are a single entity, and it's a --

19 JUSTICE SOTOMAYOR: So the answer to my
20 question is there is -- you are seeking through this
21 ruling what you haven't gotten from Congress: an
22 absolute bar to an antitrust claim.

23 MR. LEVY: No, Your Honor, that's not right.

24 JUSTICE SOTOMAYOR: So -- so answer my
25 question. What decision --

1 MR. LEVY: The direct answer to your
2 question is this: With regard to section 1 claims --
3 let's put aside section 2 claims. Let's put aside
4 claims between the NFL and other leagues. Let's put
5 aside claims that relate to nonventure conduct, like
6 the example of creating a trucking company that's
7 reflected in our brief.

8 The -- I can understand an argument, and we
9 suggested as much in our brief below, that if the
10 league engages in a practice of representing itself,
11 going to the market -- the clubs go to market as
12 independent entities. I can see an argument that
13 would basically say, based on estoppel principles,
14 that they should not be able to agree on -- on uniform
15 prices or uniform wages for secretaries, for example.

16 We did -- we made the point in our brief in
17 the context of -- of coaches. But even -- even in the
18 context of coaches, put aside for a moment, section 2
19 remains available to the coaches if in fact they can
20 demonstrate that there has been monopolization or
21 attempted monopolization of a market.

22 But the line that I draw is the line between
23 production and promotion of the game. Coaches are
24 closer to production and promotion of the game than
25 secretaries, but I -- you know, there may be some --

1 some gap there. But -- but as long as the NFL clubs
2 are -- are members of a unit; if they compete as a
3 unit in the entertainment marketplace, as -- to use
4 the language that Justice Rehnquist used -- they
5 should be deemed a single entity and not subject to
6 section 1 --

7 JUSTICE BREYER: But now the question is:
8 Are you basing that on economic-related data about the
9 pros and the cons of -- you know, the economic harms
10 of stopping them from competing versus the economic
11 benefits of allowing them to act as a separate -- as a
12 single entity? Or are you basing it on a pure legal
13 word called "single entity"?

14 And what worried -- I thought when I read
15 the opinion, first, of the district court, that he's
16 just following what I think started in the Seventh
17 Circuit, unfortunately, of taking this word "single
18 entity" and throwing around -- throwing it around all
19 over the place and stopping the economic analysis.

20 But then when I read the last paragraphs of
21 his opinion, he seems to be saying, when I go back to
22 the record, which you want me to do, I will discover
23 that there is lots of information showing economic
24 benefit to this venture of promoting together.
25 There's nothing to suggest they could compete, and so

1 it's clear, to the point where they don't get to
2 trial, that this is a reasonable agreement.

3 All right. Now, is -- have I -- am I right
4 in thinking what you are thinking?

5 MR. LEVY: That's not my position, Your
6 Honor.

7 JUSTICE BREYER: All right. Good. Then I
8 want to know what your position is.

9 MR. LEVY: My position is based on the
10 intended scope of the Sherman Act, section 1 of the
11 Sherman Act, which this Court, in Copperweld, made
12 clear. The principle is articulated five or six
13 separate times in the Copperweld opinion that section
14 1 of the Sherman Act is intended to regulate the
15 sudden joining together of separate sources of
16 economic power. That's --

17 JUSTICE BREYER: Yes --

18 MR. LEVY: That's not this case.

19 JUSTICE BREYER: Well, I wouldn't read --
20 can you read Copperweld as follows? Copperweld is
21 ratifying a decision by an entrepreneur or several to
22 organize his entrepreneurial entity as one where there
23 are obvious efficiencies in doing that, such as it
24 would obviously be inefficient to have the sales
25 people behind counters in a single department store

1 competing with each other in price.

2 A joint venture is a situation where it's
3 debatable whether or not there is that kind of
4 efficiency in organization, and, therefore, we apply a
5 rule of reason. That's Panagra. I don't see anything
6 in Copperweld that's intended to overrule Panagra.
7 And as long as Panagra is not overruled, we would
8 apply, at least to major decisions by joint ventures,
9 a rule of reason.

10 Now, what is wrong with -- and you might
11 still win on the rule of reason. But why isn't that
12 analysis correct? I'm putting it forward as a
13 hypothesis for you to discuss.

14 MR. LEVY: The analysis is not correct
15 because there has been no challenge to venture
16 formation here. I don't disagree that if there had
17 been a challenge to venture formation here, that the
18 considerations that you identify with regard to
19 Panagra would apply. But that's not the case here.
20 There's really no ambiguity about what has been
21 challenged here.

22 JUSTICE BREYER: There is very definitely a
23 joint venture here to play football, but there isn't a
24 joint venture to build houses, and there isn't a joint
25 venture obviously in sight to promote.

1 So they're saying that there's such a
2 different activity, the playing of football versus the
3 promotion of a logo, that we ought to go and look
4 under a rule of reason as to whether a joint venture
5 in promoting a logo is justified in terms of
6 competition's harms and economic benefits.

7 MR. LEVY: Justice Breyer, I agree with you
8 that there is a difference, an important difference,
9 between venture and nonventure activity. If the NFL
10 clubs were to create a trucking company or, in your
11 example, would go off and build houses, that's not a
12 venture activity.

13 JUSTICE BREYER: Well, it would be if they
14 tried to do it, but, there, they would be attacked on
15 the ground that under the rule of reason, they do not
16 have the justification such that the antitrust law
17 would allow them to do it.

18 MR. LEVY: Well --

19 JUSTICE BREYER: And they are saying: And
20 promoting is precisely the same. That's why it seems
21 to me to be something that you can't decide in theory.
22 It's a matter of going back to economic facts with
23 witnesses and so forth.

24 MR. LEVY: Your Honor, the ancillary
25 restraints doctrine would enable the court, in the

1 circumstance that you describe, to categorize the
2 decision to build housing as a non-venture activity --
3 a non-venture decision, and, therefore, it would be
4 evaluated independently of the considerations that
5 apply to the venturers' objective.

6 But, here, you cannot separate the -- the
7 venture activity of -- of -- for both football --

8 JUSTICE STEVENS: Well, but you -- you
9 certainly could because they certainly could --
10 theoretically, each club could sell its own logo.

11 MR. LEVY: Each -- of course, each club
12 could sell its own logo, Your Honor, but the clubs
13 have decided that the most effective way to promote --

14 JUSTICE STEVENS: They have decided not to
15 do it that way, but it could be done.

16 MR. LEVY: Forgive me. I shouldn't speak
17 over you.

18 The clubs have decided that the most
19 effective way to promote their product, to promote NFL
20 football, is to do so collectively, to ensure that the
21 marks of all 32 clubs are -- are out there, in --

22 JUSTICE STEVENS: Yes, but maybe they also
23 collectively decide the best way to make money and
24 finance -- attendance and so forth, all agree on a
25 housing program that they all jointly sponsor.

1 MR. LEVY: Well, Your Honor, that -- I
2 respectfully suggest that doesn't --

3 JUSTICE STEVENS: It would be the most
4 effective way to -- to raise the money to pay these
5 players who make so much money.

6 MR. LEVY: Well, that doesn't -- there's a
7 plausibility standard that really has to be applied in
8 terms of the -- of the arguments at issue.

9 CHIEF JUSTICE ROBERTS: Well, but if it's a
10 plausibility standard at the threshold inquiry,
11 there's a range of things, and I guess your -- your
12 friend on the other side is just saying selling logos
13 is closer to selling houses than it is to playing
14 football.

15 MR. LEVY: Well, but there is a difference
16 here, Your Honor, because there is a record. This --
17 this wasn't decided on a motion to dismiss. It was
18 decided on summary judgment. There was undisputed
19 evidence that the purpose of the licensing, going back
20 40 years -- 45 years, at this point, was to promote
21 the game, and that's not an implausible determination
22 to be made, but the -- but the evidence was
23 undisputed.

24 The case was decided on summary judgment,
25 and so -- you know, this is not a situation where --

1 where there's the type of -- you know, the range of
2 issues that needs to be -- you know, that needs to be
3 resolved, of the kind that you described.

4 You know, this is a situation that Judge
5 Moran --

6 CHIEF JUSTICE ROBERTS: So if there's a
7 factual -- if there's a factual dispute about whether
8 a particular activity of the league is designed to
9 promote the game or is designed simply to make more
10 money, than that is the sort of thing that goes to
11 trial?

12 MR. LEVY: Well, I wouldn't -- I wouldn't
13 put it in terms of "make more money" because I have
14 agreed with Justice Scalia --

15 CHIEF JUSTICE ROBERTS: Or do something
16 else, do something other than promote the game?

17 MR. LEVY: If -- Your Honor, just as in
18 Dagher -- in Dagher, the issue was how to price the
19 product. It's a fundamental decision that any venture
20 has to make. This is a decision -- the undisputed
21 evidence shows that this is a decision about how to
22 promote the product, and that's no different from
23 pricing a product in terms of the -- you know, the
24 operations of a venture.

25 You can't -- you can't hope to market a

1 product, unless you have decided on how to promote it,
2 and the antitrust laws in the Sherman Act encourage
3 promotion. They encourage -- Copperweld encourages
4 business people to make the judgment about how best to
5 produce and to promote their product and how best to
6 compete in the marketplace.

7 They made very clear that they don't want
8 those judgments cabined or inhibited or chilled by --
9 by decisions by the court or decisions by a jury.
10 But, here, Judge Moran did what we thought was the --
11 and we continue to think is the most appropriate way
12 to serve the interests of both the Sherman Act and the
13 considerations that this Court has recognized in
14 Twombly and other cases, and that's to provide an
15 early opportunity for a determination of whether or
16 not the venture -- the venture conduct, the venture
17 decision that is at issue, is a venture decision of a
18 single entity or whether it is a collective decision
19 of the -- of the venture participants.

20 He allowed discovery limited to the single
21 entity issue. The -- the -- there is no challenge to
22 the scope of discovery here. We have a complete
23 record on this point that confirms and addresses the
24 question that you presented, that the purpose of
25 licensing here is to promote the product.

1 But even if it weren't -- even if it
2 weren't, I'd suggest that -- that the -- the evidence
3 shows that fans identify with the logos, and we are
4 talking about the logos and the marks here, not
5 because they have some sort of intrinsic value, not
6 because they, you know, derive -- they derive some
7 value from their attractiveness or appeal,
8 independently in the marketplace; they derive their
9 value from their identification with an NFL club that
10 competes on the football field. And even -- even
11 American Needle's president so confirmed in the
12 declaration that he submitted in the case.

13 So we have here a record that makes this --
14 this judgment for the Court relatively
15 straightforward. It provides a straightforward
16 opportunity for this -- this Court to confirm the
17 principles established in -- established in Copperweld
18 and to -- and to extend the principles that this Court
19 noted in Dagher.

20 JUSTICE SOTOMAYOR: The -- if the
21 reasonableness of this decision, that T-shirts promote
22 the game, is so self-evident, then why wouldn't the
23 rule of reason control completely?

24 MR. LEVY: Well, Your Honor, I don't have --

25 JUSTICE SOTOMAYOR: Why do we need to even

1 go to the single-entity question when, by your own
2 answer, it is undisputed, so abundantly clear, so
3 reasonable?

4 MR. LEVY: The answer --

5 JUSTICE SOTOMAYOR: What's the need to -- to
6 label it "single entity," as opposed to label it what
7 it is, reasonable?

8 MR. LEVY: The answer, Your Honor, is
9 inherent in the rule of reason. In the modern era,
10 defending a claim like this on the merits involves an
11 investment of tens of millions of dollars, thousands
12 of hours of executive time, hours and hours of court
13 time. In the Salvino case, there were 3 years of
14 discovery spent on rule of reason issues --

15 JUSTICE SOTOMAYOR: But this is the whole
16 purpose, and I certainly sympathize with that
17 argument. But isn't the proposition of antitrust law
18 that we have a reason for worrying about concerted
19 activity? We have a genuine concern as -- well,
20 Congress does -- about independent entities joining
21 together and fixing prices.

22 And we permit them to do so, as Justice
23 Breyer indicated, when the venture has a purpose
24 that's independent than -- from the individual
25 interests, but we say, when it doesn't, we have to

1 ensure, under the rule of reason, that what they are
2 doing is reasonable.

3 I'm -- I'm very swayed by your arguments,
4 but I can very much see a counterargument that
5 promoting T-shirts is only to make money. It doesn't
6 really promote the game. It promotes the making of
7 money. And once you fix prices for making money,
8 that's a Sherman Act violation.

9 MR. LEVY: But, Your Honor, I would agree
10 with almost everything that you said, but we are not
11 dealing here with independent sources of economic
12 power. These clubs are not independent. None could
13 produce their product on their own.

14 JUSTICE SOTOMAYOR: But they own the
15 trademarks, so they could.

16 MR. LEVY: They do, but the trademarks don't
17 have any value. They don't have any purpose
18 independent of the game. The trademarks are invented
19 to identify the clubs on the field. They are -- they
20 are promoted and distributed to -- to encourage
21 loyalty among fans of the clubs. The -- the
22 trademarks are simply a tool that the clubs use to --

23 JUSTICE BREYER: So let's call it "NFL
24 supermarket." Red Sox supermarket, Patriots
25 automobile shop, Patriots tractor store -- everything

1 becomes Patriots. Everything -- no competition
2 anywhere. Now, you say that's ridiculous, and once
3 you say that's ridiculous, you are now into the
4 business of deciding whether this aspect of the
5 undeniable legal joint venture to play baseball or
6 football -- whether this aspect is properly the
7 subject of merger.

8 And once you're into that, you're into your
9 \$7 million, and I can't really think of anything
10 that's going to help you there.

11 MR. LEVY: Well --

12 JUSTICE BREYER: And the SG in its brief,
13 you see, on that key 16 and 17, it would seem to me,
14 simply reproduces in precisely somewhat different
15 language, but precisely the argument you are now
16 having: Is this the kind of thing that should be
17 merged? We know by applying the rule of reason.

18 And, second, if it is merged, is this
19 particular aspect of it something where there could be
20 competition, and there isn't much justification?
21 That's their rule, too. Again, we are back to the
22 rule of reason. So, how do I save you the \$7 million?

23 MR. LEVY: But, Your Honor, this case is the
24 perfect example. We were able to resolve this case on
25 summary judgment without incurring the burden of rule

1 of reason discovery, and your reference to the
2 Patriots tractor store drives home a distinction that
3 I think is worth leaving with the Court at this point.

4 This is not a situation, like the situation
5 to which we adverted in our brief, where John Deere
6 and International Harvester get together and fix the
7 prices of their logos for sale to cap manufacturers.

8 John Deere and International Harvester, for
9 many years -- I mean, early on, they gave away the
10 hats throughout the Midwest to encourage farmers to
11 buy their farm equipment. They are independent
12 sources of economic power.

13 JUSTICE SCALIA: Well, you -- you say that
14 the -- that the trademarks have no value apart from
15 the -- from the game. I guess you could say the same
16 thing for each individual franchise of each of the 32
17 clubs. They are worthless, if NFL football
18 disappears. So does that mean they -- they can agree
19 to fix the price at which their -- their franchises
20 will be sold, by concerted agreement, because after
21 all, they're worthless apart from the NFL?

22 MR. LEVY: Well, I -- I certainly agree with
23 your -- your premise, Your Honor, that they are
24 worthless apart from the -- except -- I mean, there's
25 some residual value. I don't -- I don't --

1 JUSTICE SCALIA: Yes.

2 MR. LEVY: I don't dispute -- dispute that.
3 Could they agree on prices for their franchises to be
4 sold? Yes, I assume they could agree because they are
5 not independent sources of economic power.

6 JUSTICE SCALIA: Oh, okay, you --

7 JUSTICE BREYER: So we don't even ask the
8 question whether under the rule of reason such a thing
9 is reasonable or justified?

10 MR. LEVY: Your Honor --

11 JUSTICE SCALIA: I thought I was reducing it
12 to the absurd. But you --

13 (Laughter.)

14 MR. LEVY: You know, I -- I could bring the
15 basic point that I -- I want to leave you with back to
16 our example that's a little bit closer to home.

17 In 1999 -- 1919, when Judge Covington and
18 Mr. Burling went to join forces, they formed a law
19 firm eventually. Ninety years later, that venture
20 decides on the prices, the rates that Mr. Ludwin and I
21 will -- will decide for our -- will charge for our
22 services. Sometimes that venture, the firm, decides
23 that we won't do business with a particular client or
24 that we'll limit our business to a particular client
25 in a particular industry.

1 Nobody suggests that that decision of the
2 venture, a lawful venture, is subject to section 1
3 scrutiny as a violation of the Sherman Act,
4 constitutes a concerted refusal to deal.

5 But if Mr. Ludwin and I leave the -- leave
6 the firm and we set up solo practices and then decide
7 on what our rates are going to be or then decide on
8 what our -- what clients we will serve and not serve,
9 that is an agreement between independent competitors.
10 That's the fundamental difference.

11 That is a fundamentally different situation
12 between -- compared to the situation of the firm
13 setting our rates. And it reflects the intersection
14 of Copperweld and Dagher. It shows how Dagher and
15 Copperweld fit together hand in glove to demonstrate
16 that the NFL, for purposes of promoting its product,
17 is a single entity.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Nager, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF GLEN D. NAGER

21 ON BEHALF OF THE PETITIONER

22 MR. NAGER: Thank you, Mr. Chief Justice.

23 I'd just like to pick up on a question that
24 Chief Justice Roberts asked me with a point that
25 Justice Breyer made, which is that both the Solicitor

1 General's position and the NFL's position are taking
2 rule of reason concepts and trying to push them into
3 the concerted conduct inquiry, which will have the
4 effect, of course, of confusing courts that presently
5 understand the inquiry. That's Justice Breyer's point
6 about terminology.

7 It also has substantive impact because of
8 the way litigation gets conducted. As Mr. Levy has
9 said, this case was litigated below at the district
10 court judge's direction only on the concerted conduct
11 question, not on the -- the rule of reason questions.
12 So, American Needle didn't have the opportunity to
13 conduct discovery and make proof about anticompetitive
14 effects and to try to rebut the arguments that the NFL
15 was making about pro-competitive justifications.

16 The NFL's argument is asking -- they are
17 asking for a per se rule of legality for everything
18 that the NFL does that is related to football. That
19 can't be the --

20 CHIEF JUSTICE ROBERTS: What's the answer to
21 the -- what's the answer to the hypothetical Mr. Levy
22 ended with, the law firm?

23 MR. NAGER: On the -- the partnership
24 example? Well, the partnership is -- is as follows:

25 As -- as to the extent that there's case law

1 on the subject, as with all joint ventures, the case
2 law treats law firm partnerships as joint ventures and
3 subjects them to the rule of reason, and every
4 commentator, whether it be Judge Bork or anyone else,
5 has said: But, of course, law firms don't have market
6 power so they couldn't possibly have anticompetitive
7 effects on the market, and a rule of reason claim
8 trying to challenge the rates at which a law firm sets
9 its partnership rates wouldn't pass -- survive a
10 motion to dismiss.

11 With respect to his analogy to Dagher, the
12 difference between the Dagher effects -- of course
13 this Court didn't in Dagher didn't accept the argument
14 that I made on behalf of Texaco and Shell that they
15 should be treated as a single entity if, in fact,
16 their formation was lawful. This Court only ruled on
17 the -- on the price-fixing issue.

18 But the argument that was made in Dagher was
19 if you had a wholly integrated joint venture, one in
20 which there had been a complete pooling of relevant
21 capital, a complete sharing of profits and losses, and
22 an enforceable non-compete agreement, in those
23 circumstances the -- the owners of that joint venture
24 were not like typical joint venturers; they, in fact,
25 were like the shareholders in a publicly held company

1 because their only interest at that point is in their
2 investment. They have no other economic interests
3 that are affected by their ownership and control of
4 that entity. And at that point, they could be treated
5 as one.

6 And Justice Thomas's opinion for the Court
7 has some resonance of that in it, but it specifically
8 says it's only addressing it in terms of the per se
9 rule.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 11:19 a.m., the case in the
13 above-entitled matter was submitted.)

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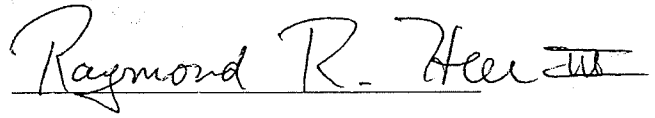
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of AMERICAN NEEDLE, INC., Petitioner, v. NATIONAL FOOTBALL LEAGUE, ET AL.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

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